In the Supreme Court of Missouri

Cause No.
84659

STATE ex rel. KATHLEEN DIEHL,

Relator,

v.

HONORABLE JOHN R. O'MALLEY
Judge, Division 6,
Circuit Court of Jackson County, Missouri,

Respondent.

REPLY BRIEF OF RELATOR

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ARGUMENT

I. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR'S MOTION FOR JURY TRIAL BECAUSE THE MISSOURI CONSTITUTION GUARANTEES THE RIGHT TO A TRIAL BY JURY AS IT EXISTED AT COMMON LAW AT THE ADOPTION OF THE FIRST CONSTITUTION IN 1820, INCLUDING FOR CAUSES OF ACTION SUBSEQUENTLY CREATED BY STATUTE THAT ARE ANALOGOUS TO ACTIONS THAT WERE TRIABLE TO A JURY AT COMMON LAW, IN THAT PLAINTIFF'S CLAIM SEEKING MONEY DAMAGES ONLY, IN REDRESS OF DEFENDANT'S VIOLATION OF HER RIGHTS UNDER THE MISSOURI HUMAN RIGHTS ACT, IS ANALOGOUS TO THOSE ACTIONS THAT WERE TRIABLE TO A JURY AT THE TIME OF THE ADOPTION OF THE FIRST CONSTITUTION.

A. PROHIBITION IS THE APPROPRIATE REMEDY FOR IMPROPER DENIAL OF THE RIGHT TO TRIAL BY JURY

Respondent first argues, in spite of well-settled uniform case law directly on point to the contrary, that Prohibition is not an appropriate remedy for the improper denial of the right to trial by jury. To the contrary, "[p]rohibition will lie where a right to a jury trial is improperly denied." *State ex rel. Estill v. Iannone* 687 S.W.2d 172, 175 (Mo. banc 1985) *citing XLNT Corp. v. Municipal Court of Kansas City*, 546 S.W.2d 6, 7 (Mo. banc 1976). Respondent's brief ignores and therefore fails to distinguish this uniform case law which makes clear that prohibition will lie to correct Respondent's denial of Relator's motion for jury trial if Relator is correct in her contention that she has a Constitutional right to

trial by jury. Instead, Respondent argues simply that the line of cases beginning with *State ex rel. Tolbert v. Sweeney*, 828 S.W.2d 929, 931 (Mo. App. S.D. 1992), was correctly decided. This is the issue before the Court and, should the Court ultimately determine that *Sweeney* was correctly decided, the preliminary Writ of Prohibition will undoubtedly be vacated. On the other hand, if the Court concludes that the Constitution does indeed entitle Relator to a trial by jury, then Respondent's denial of Relator's motion for jury trial was improper, notwithstanding the several erroneous intermediate appellate decisions to the contrary and, pursuant to *Iannone*, the Court must then make permanent the preliminary writ.

B. THE CONSTITUTION GUARANTEES THE RIGHT TO A JURY TRIAL IN AN ACTION ENFORCING A RIGHT CREATED BY A STATUTE EVEN THOUGH THE STATUTE WAS ENACTED AFTER 1820

In both *Briggs v. St. Louis & San Francisco Railway Co.*, 20 S.W. 32, 33, 111 Mo. 168 (1892) and *Bates v. Comstock Realty Co.*, 267 S.W. 641, 306 Mo. 312 (1924), the Court expressly dealt with the issue of whether the Constitution guarantees the right to trial by jury in cases arising under statutes adopted after the first constitution of 1820. In both cases, the Court rejected the notion – advanced by Respondent in his brief at p. 13 – that the Constitution does not guarantee the right to trial by jury in cases arising under statutes passed after 1820. In *Briggs*, the Court found the Constitution guaranteed the right to trial by jury of a case arising under an 1889 statute. In *Bates*, the Court again rejected the notion that the Constitution does not guarantee the right to trial by jury in actions created after adoption of the first Constitution, but went on to conclude that there was no right to trial by jury of an

action to enforce a special tax lien pursuant to a city charter adopted in 1914 because such an action was analogous to a suit in equity.

Eschewing these cases that directly address and decide this issue against Respondent, Respondent instead points to isolated *dicta* in *Hammons v. Ehney*, 924 S.W.2d 843 (Mo. banc 1996), as his only support for arguing the contrary position. The claim in *Hammons* was for contribution between joint debtors, one of whom had been called upon by the creditor to pay the entire debt. *Hammons* did not involve any claim arising under any statute adopted after 1820 and, therefore, *Hammons* can not reasonably be interpreted to overrule *Briggs*.

The issue in *Hammons*, and what the *Hammons* court was referring to when it used the "proceedings subsequently created" language relied upon by Respondent, was whether the creation of a common law of right of contribution after 1820 brought such an action within the Constitutional guarantee of the right to trial by jury when contribution actions had been maintainable only in equity at the time of the adoption of the first constitution in 1820. *Hammons* concluded that it did not, reiterating that it is the state of the common law in 1820 that determines the right to trial by jury, not the state of the common law at the time of the adoption of any of the three subsequent Missouri constitutions.

Hammons is in no way inconsistent with *Briggs* or *Bates*, both of which hold that if the particular claim did not exist in 1820, the court must then determine whether the claim is analogous to cases then tried at law or to cases then tried in equity. *Hammons* did not require resolution by analogy because the precise claim asserted in *Hammons* – a claim for contribution by one joint debtor against another – did exist in 1820 as a claim in equity but not as a claim at law. *Hammons,* in short, does not support Respondent's argument.

Respondent next argues that this Court's holding in *DeMay v. Liberty Foundry Co.*, 37 S.W.2d 640 (Mo. 1931), justifies the denial of the right to trial by jury to Relator. Like the court in *Sweeney*, Respondent misconstrues the Court's holding in *DeMay*. Foremost among the reasons cited by the Court in *DeMay* for concluding that there is no Constitutional right to trial by jury in a claim arising under the Workmen's Compensation Act is that they involve "determination of claims for compensation (as distinguished from compensatory damages)." *Id.* at 648. This, of course, is in stark contrast to common law claims for damages which have always been held to be within "the peculiar province of the jury to determine." *Grott v. Johnson, Stephens & Shinkle Shoe Co.*, 2 S.W.2d 785, 790 (Mo.1928). In fact, even Respondent acknowledges that it was largely the difference in *remedy* between awards under the Workmen's Compensation Act and those existing at common law that led to the holding in *DeMay:* "this Court found that the statutory remedy was so different and new that no right to jury trial attached." (Resp. Br. p. 16).[1]

Unlike the "different and new" remedy created by the Workmen's Compensation Act, the remedy allowed by § 213.111 and sought in the present action is simply "actual and punitive damages," a

[1] For the same reason, Respondent's reliance on *Miller v. Russell*, 593 S.W.2d 598 (Mo. App. W.D. 1979), an action by the juvenile court to determine paternity and assess support obligations rather than to determine damages, is likewise misplaced.

remedy neither different nor new, and one that has always been held in Missouri to be peculiarly within the province of the jury to determine. *Grott,* 2 S.W.2d at 790.

In summary, neither *Hammons* nor *DeMay,* the two cases principally relied upon by Respondent, support Respondent's argument that there is necessarily no Constitutional right to a trial by jury in a suit based on a cause of action that was statutorily created after 1820. Respondent fails entirely to distinguish *Briggs* and *Bates*, both of which hold that the non-existence of a particular right of action in 1820 *is not* dispositive of whether the action nevertheless comes within the Constitutional right to trial by jury.

C. A CLAIM FOR MONEY DAMAGES IS NECESSARILY A CLAIM AT LAW TRIABLE TO A JURY, UNLESS ITS ORIGIN WAS IN EQUITY OR IT IS ASSERTED TOGETHER WITH A CLAIM FOR EQUITABLE RELIEF.

Respondent's next argument includes the enunciation of a flawed syllogism which he attributes to Relator and then dispatches. (Resp. Br. p. 18). Respondent's syllogism – "*if* a prayer for monetary relief, *then* a right to jury trial" – is flawed because it is stated in absolute terms and can therefore be disproved by proof of a single exception, such as the one that determined the outcome in *Hammons*.[2] The actual rule relied upon by Relator is properly stated in logical form as follows: if the relief sought is monetary damage, then the Constitution guarantees both parties the right to trial by jury *unless either*

[2] In spite of the argument attributed to her, Relator accurately reported the language of *Hammons*, that "*[n]ormally* when distinguishing between legal and equitable actions one looks to the remedy requested." *Hammons*, 924 S.W.2d at 846 (Emphasis added).

the form of action was maintainable only in equity in 1820 *or* equitable relief is also sought. All of the cases, whether cited by Relator or Respondent, are reconcilable with the rule stated thusly.

As discussed above, there was no right to a jury trial in *Hammons* because the Court determined that the form of action – a claim for contribution by one debtor against another – "originated as an equitable action in Missouri." 924 S.W.2d at 846. As such, there was no right to trial by jury on such a claim in 1820 and therefore, the Constitution does not guarantee such a right for the obvious reason that it was not "heretofore enjoyed." *Id.* at 849. Although the Court in Hammons does not discuss the connection, it bears noting that an action for contribution is essentially one for liquidated damages and therefore does not require the fact finder to assess or determine the amount of damages, something that Missouri has always held lies within the peculiar province of the jury. *Grott v. Johnson, Stephens & Shinkle Shoe Co.*, 2 S.W.2d 785, 790 (Mo.1928).

Respondent attempts to distinguish *Lee v. Conran,* 111 S.W. 1151, 1153, 213 Mo. 404 (Mo. 1908), on the grounds that the holding there "had nothing to do with the remedy requested by the parties." (Resp. Br. p. 20). Nothing other than a close reading of the Court's opinion in *Lee* is needed to reject this argument:

> So far as I am aware, this court has never passed directly upon the question as to whether or not the parties to a suit, based upon section 650, Rev. St. 1899 (Ann. St. 1906, p. 667), are entitled to a jury. In order to properly determine that question, we must first ascertain the nature of the issues joined, *and the remedy the parties are entitled to under the pleadings*. If the issues joined entitle the parties to an *ordinary judgment at law*, then, under the Constitution and the laws of the state, the parties are entitled to a

trial by a jury; but if the issues tendered are *equitable in their nature*, and call for equitable relief, then the cause is triable before the chancellor.

Id. at 1153 (Emphasis added). Indeed, this very language from *Lee* has often been cited by this Court as the basic rule for determining whether or not a jury trial is secured by the Constitution. *See e.g., Plaza Exp. Co. v. Galloway*, 365 Mo. 166, 176, 280 S.W.2d 17, 24 (Mo. banc 1955); *Wolfersberger v. Hoppenjon*, 334 Mo. 817, 825, 68 S.W.2d 814, 817 (Mo. banc 1933); and *Citizens' Trust Co. v. Going*, 232 S.W. 996, 998 (Mo. 1921).

Relator has never claimed, nor is it essential to her argument, that the only relief obtainable through "an ordinary judgment at law" is monetary relief. However, absent a demonstration that the particular form of action was maintainable only in equity in 1820, a claim for money damages only entitles the parties to "an ordinary judgment at law" and the Constitution guarantees the parties the right to trial by jury of such a claim. *Lee*,111 S.W. at 1153.

Respondent argues that *Bates v. Comstock Realty Co*., 267 S.W. 641 (Mo. 1924), supports his position because it was an action "seeking to enforce a monetary liability" and the case was "not triable to a jury." Respondent misreads *Bates*. *Bates* involved a suit to enforce a tax lien created under the authority of the charter of the City of St. Louis. *Id.* at 644. The problem was that the charter did not prescribe any means of enforcing the lien. The Court therefore resorted to the rule that "[i]f a statute gives a lien and provides no particular mode to enforce it, equity will then supply a remedy." *Id.* The Court went on to note that "[t]he only action competent for that purpose, in the absence of a specific statutory mode of procedure, is one in equity." *Id.* Thus, in *Bates*, the parties were not seeking "an

ordinary judgment at law" but appealing to equity to supply a remedy which neither the common law nor the charter provided.

Bates was cited by Relator because, like *Briggs*, it refutes the Respondent's main argument that if an action did not exist in 1820, there can be no right to a trial by jury. *Bates* specifically rejects this narrow interpretation:

> It is argued by respondent that as actions on special tax bills were unknown at common law there is no common law right of trial by jury preserved inviolate by section 28, art. 2, of the Constitution. The construction of that provision as implied in the argument is, we think, too narrow. The right of trial by jury as it existed at common law may well include the right to such a trial not only in common law action, so called, but those of like nature in which that mode of trial is appropriate. Colon v. Lisk, 153 N. Y. 188, 47 N.E. 302, 60 Am. St. Rep. 609; North Penn. Coal Co. v. Snowden, 42 Pa. 488, 82 Am. Dec. 530. The question then resolves itself into whether the proceeding for the collection of special tax bills is analogous to an action at common law, or whether it is in the nature of a suit in equity.

Bates, 306 Mo. 312, 328, 267 S.W. 641, 644 (Mo.1924). Because "the issues joined entitle the parties to an ordinary judgment at law" – *Lee*, 111 S.W. at 1153 – and because Relator's claim "is analogous to an action at common law" – *Bates*, 267 S.W. at 644 – the Constitution guarantees Relator the right to trial by jury of her claim.

Respondent next attempts to minimize the holding in *Briggs v. St. Louis & San Francisco Railway Co.*, 20 S.W. 32, 33, 111 Mo. 168 (1892), on the basis that "*Briggs* analyzed the jury-trial

issue based on a statute, § 2131, Rev. Stat. 1889, *not* on the basis of the constitution alone." (Resp. Br. p. 21). While Respondent's statement is technically accurate, it is misleading. In *Briggs*, the Court first addressed the argument that the statute under which suit was brought was unconstitutional because it did not expressly provide for the right to trial by jury:

> It is very clear to us that the defendant was entitled to a jury trial in the assessment of the value of the legal services, and *the statute could not deprive it of that right*. Yet it does not follow that the law is unconstitutional for the reason that it does not expressly reserve the right to a jury trial. *That constitutional right is implied in all cases in which an issue of fact, in an action for the recovery of money only, is involved, whether the right or liability is one at common law or is one created by statute*. The right to a jury trial exists in all proper cases without an express grant.

20 S.W. at 33 (Emphasis added). This holding of *Briggs* – that the Constitutional right to trial by jury is guaranteed in all cases seeking only the recovery of money and in which an issue of fact is involved – is one from which this Court has never wavered. It is ultimately dispositive of the issue before the Court in this case.

After stating that it was "very clear" to the Court that the statute creating the cause of action could not deprive defendant of its Constitutionally guaranteed right to trial by jury of the claim, the Court considered whether the right to trial by jury had been waived. In light of the Court's holding that "the constitutional right [to trial by jury] is implied in all cases in which an issue of fact, in an action for the recovery of money only, is involved, whether the right or liability is one at common law or is one created

by statute," the only relevance to the Court's holding of the statute pointed to by Respondent is on the issue of waiver. Unlike the Constitutional provision which did not address the issue of waiver, the statute Respondent points to specifically allowed the parties to waive the right to trial by jury. *Briggs* then notes that,

> Under the statute (section 2133) a jury may only be waived in one of three modes: *First*, by failing to appear at the trial; *second*, by written consent in person or by attorney, filed with the clerk; *third*, by oral consent in court, entered on the minutes. No waiver in any of these methods is shown to have been made.

Id. at 33.

Thus, contrary to Respondent's argument, the discussion of a parallel statutory provision in *Briggs* does not in any way undercut the "very clear" holding that "the constitutional right [to trial by jury] is implied in all cases in which an issue of fact, in an action for the recovery of money only, is involved, whether the right or liability is one at common law or is one created by statute," even, obviously, a claim created by a statute adopted after 1820 as *Briggs* implicitly holds and *Bates* later expressly states. Rather, the parallel statutory provision was discussed in *Briggs* only to resolve the issue of whether the Constitutional right to trial by jury had been waived by one of the statutorily prescribed methods.

D. THE FACT THAT THE CAUSE OF ACTION CREATED BY THE MHRA WAS "WHOLLY UNKNOWN" IN 1820 MEANS THAT IT CANNOT BE ANALOGOUS TO AN ACTION THEN EXISTING IN EQUITY, THEREBY MAKING THE RELIEF REQUESTED – "AN ORDINARY JUDGMENT AT LAW" – CONTROLLING ON THE ISSUE OF RELATOR'S CONSTITUTIONAL RIGHT TO TRIAL BY JURY

Respondent next argues that because Relator would have been unable to sue her employer for age or sex discrimination at common law, there can be no right to trial by jury since the right was not "heretofore enjoyed." Other than citation to the *dicta* in *Hammons* discussed above, Respondent cites no authority in support of this argument which, as pointed out above, is refuted by *Briggs* and *Bates*. The only real significance of Respondent's point that the present action was not maintainable in 1820 is that it demonstrates that unlike the claim in *Hammons*, the present action is not traceable to one that existed in equity in 1820. Therefore, the relief sought – "an ordinary judgment at law" – controls on the issue of Relator's Constitutional right to trial by jury. *Lee*, 111 S.W. at 1153.

E. RELATOR'S CLAIM IS NOT AN ADMINISTRATIVE ACTION

Respondent devotes almost five pages to discussing the procedures under the MHRA that *would have been* applicable, had Relator's charge been resolved by the Missouri Commission on Human Rights within 180 days. (Resp. Br. pp. 27-32). For whatever reason, that did not occur. The issue before the Court is whether the Constitution guarantees plaintiff the right to trial by jury of this "civil action" filed pursuant to § 213.111 R.S.Mo in "circuit court" to recover "actual and punitive damages."

Although Respondent quotes liberally from Chapter 213 regarding the details of the administrative proceeding that *might have* taken place had Relator not received a notice of right to sue, Respondent omits from his discussion the following passage from § 213.111 R.S.Mo, the very section pursuant to which Relator brings her claim:

> Upon issuance of this notice [of the aggrieved person's right to bring a civil action], the commission shall terminate all proceedings relating to the complaint. No person may file or reinstate a complaint with the commission after the issuance of a notice under this section relating to the same practice or act.

Thus, regardless of the procedures applicable inside the Missouri Commission on Human Rights, once the notice of the "right to bring a civil action" has been issued, those proceedings are terminated and cannot be reinstated. Once the civil action is filed, the rules applicable to "civil actions" control, including the Constitutional right to trial by jury, depending upon the "issues tendered by the pleadings." *Lee,* 111 S.W. at 1153.

Because neither Relator nor Respondent are contending that the Missouri Human Rights Act is an impermissible piece of legislation, Respondent's citation to *Percy Kent Bag Co v. Missouri Commission on Human Rights*, 632 S.W.2d 480 (Mo. 1982) – a case holding that the MHRA is not an unconstitutional delegation of judicial power to an administrative agency – adds nothing of relevance to the analysis.

Respondent next cites *Missouri Comm'n on Human Rights v. Red Dragon Restaurant, Inc.*, 991 S.W.2d 161, 170 (Mo. App. W.D. 1999), for the proposition that "a civil rights claim is not analogous to a tort claim for intentional infliction of emotional distress." However, Respondent either

misunderstands, this quote, or takes it out of the context of the discussion. In *Red Dragon*, the court held that the purpose of the MHRA – remediating discrimination – justifies departure from the rule enunciated in *Bass v. Nooney Co.*, 646 S.W.2d 765 (Mo. banc 1983), as to what kind of proof is necessary to support an award of damages for emotional distress in a negligence case. In fact, in *Conway v. Missouri Commission on Human Rights,* 7 S.W. 3d 571, 575 (Mo. App. 1999), the court explained that *Bass* "involved a negligence action and has been held inapplicable to intentional torts" in explaining why the *Bass* rule was likewise held in *Red Dragon* to be inapplicable to claims for violations of the Missouri civil rights laws.

Obviously, emotional distress damages are more likely to occur, and therefore more foreseeable, when a person is subjected to intentional discrimination in employment than when the defendant has merely acted negligently. The obvious differences between negligence and intentional torts/employment discrimination cases that justify applying different rules for the recovery of emotional distress damages do not make discrimination cases more akin to cases in equity. Certainly no one would suggest that the differences between tort and contract actions justify treating contract actions as equitable and denying the right to trial by jury in such actions where facts are in dispute and money damages is the only relief sought.

F. RELATOR SEEKS NO EQUITABLE RELIEF

Respondent's next argument mischaracterizes the type of relief sought by Relator and, indirectly, the type of relief allowed by § 213.111: "Relator's Petition and Amended Petition in the underlying case assert a claim for back pay and front pay." (Resp. Br. p. 30). Significantly, neither term, "back pay" nor "front pay," appear in either Relator's petition or amended petition. Likewise, neither term can be found in the statute pursuant to which Relator brings her action – § 213.111 R.S.Mo. Instead, § 213.111

allows recovery for "actual and punitive damages," terms that are historically legal in character and, in Missouri, at least within "the peculiar province of the jury to determine." *Grott v. Johnson, Stephens & Shinkle Shoe Co.*, 2 S.W.2d 785, 790 (Mo.1928).

Although Respondent cites two Missouri cases that discuss "back pay," neither of them deals with the statute at issue. *Percy Kent Bag Co v. Missouri Commission on Human Rights*, 632 S.W.2d 480 (Mo. 1982), dealt with § 296.040.7, part of the predecessor to the current Missouri Human Rights Act which Respondent acknowledges has been repealed. (Resp. Br. p. 34).[3] *Altenhofen v. Fabricor, Inc.*, 81 S.W.3d 578, 582 (Mo. App. W.D. 2002), was brought under the Fair Labor Standards Act, a statute that uses the "back pay" terminology.

In summary, Respondent's argument that Relator's amended petition seeks equitable relief, ignores the language of the statute, misstates the language of plaintiff's petition and first amended petition and relies entirely upon cases interpreting different statutes.

G. ALTHOUGH IRRELEVANT TO THE ISSUE OF WHAT THE CONSTITUTION PERMITS, THE QUESTION OF WHETHER THE

[3] Interestingly, and as discussed at p. 23-24, *infra*, Respondent argues the Court should place great weight on the fact that the predecessor to the Missouri Human Rights Act contained a provision for the trial by jury of appeals from administrative decisions, which provision was not retained in the current MHRA. However, Respondent's brief is silent regarding the conclusion the Court should draw from the fact that the legislature changed the remedy that was available under the prior act ("back pay") to "actual and punitive damages" under the new act.

LEGISLATURE INTENDED JURIES TO DECIDE CIVIL ACTIONS

UNDER THE MHRA IS AT BEST UNCLEAR

Although the issue of what the legislature intended is not before the Court, Respondent devotes the last several pages of his brief to arguing that the legislature did not intend to create a right to trial by jury for civil actions under the MHRA. Respondent's arguments regarding legislative intent are flawed.

First, Respondent points out that the prior act provided for jury trials of appeals from administrative decisions of the Missouri Commission on Human Rights. This provision was a peculiar one from the start. It directly contradicted the whole purpose of the Missouri Administrative Procedure Act which provides for circuit judges to review appeals from administrative decisions to ensure that there is substantial evidence in the agency record to support them. *See* § 536.140 R.S.Mo. So it is not surprising the legislature repealed it. By contrast, the Missouri legislature has provided that juries rather than judges should ordinarily hear and decide civil actions for damages brought directly in circuit court. *See* § 510.190.1 R.S.Mo. "[U]nless a specific statute says otherwise or the parties have waived their right, each party has a right to have his or her circuit court civil case heard by a jury." *Advanced Transmissions v. Duff*, 9 S.W.3d 743, 744 (Mo. App. 2000). It would be imprudent, not to mention contrary to § 510.190.1, to assume that just because the legislature did not want juries to decide administrative appeals from the Missouri Commission, in a context where the norm is against jury trials, it likewise did not want juries to decide civil cases brought directly in circuit court under the private remedy provisions of the MHRA, in a context where the norm favors jury trials.

Second, Respondent argues that "by specifying that an action shall be brought 'before a circuit or associate circuit *judge*,' the MHRA's plain language clearly contemplates a bench trial," citing

Sweeney. While *Sweeney* does indeed so reason, its reasoning is wrong. The statute that creates and governs the right to bring will contest actions, § 473.083, specifies that an action to contest a will shall be "heard before a circuit judge." § 473.083.4. However, the same statute later provides that in such an action, "the issues shall be tried by a jury." § 473.083.7. Thus, Respondent's assertion that statutory language identifying the type of judge by whom an action shall be heard or before whom it shall be brought universally excludes a legislative intent to have fact issues in such actions resolved by a jury, is disproved by the will contest statute.

Similarly, Respondent's two amici argue that the language in § 213.111.2 stating that "the court may grant as relief . . ." necessarily means the legislature did not intend such actions to be tried to a jury. This argument is equally misplaced. At least one Missouri appellate court held long before *Sweeney* that the use of the term "court" in the remedy provision of another statute protecting workers, the Fair Labor Standards Act, means the court and jury, and is not limited to the narrow construction of meaning "the trial judge." *Ashenford v. L. Yukon & Sons Produce Co.*, 172 S.W.2d 881, 890 (Mo. App. 1943).

Third, Respondent points out that "an amendment to the MHRA passed by the General Assembly in 1989 provided that 'such action shall be tried before a jury if one is requested by either party.'" (Resp. Br. p. 35). From this action by a subsequent General Assembly, Respondent argues that the intention of the earlier General Assembly can be ascertained. This argument, which is dubious on its face, also overlooks the equally likely possibility that the General Assembly was merely attempting to *clarify* the intention of the earlier General Assembly that jury trials be available in cases brought under the MHRA. The MHRA does not state, in so many words, that such cases are triable to a jury, such that the

statute is not as clear as it could be. It is just as likely that this lack of clarity gave rise to the effort in House Bill 758 to remove all doubt about the matter by making it clear, once and for all, that the parties to a private action under the MHRA must be afforded the option of trial by jury. "An amendment to a statute may be to clarify rather than to change it." *Independent Stave v. Missouri Hwy. and Transp.*, 702 S.W.2d 931, 933 (Mo. App. 1985).

H. FRANTIC PREDICTIONS OF A "TIDAL WAVE OF NEW LITIGATION" AND "RUN AWAY JURY VERDICTS" DO NOT PERMIT THE COURT TO IGNORE THE CLEAR LANGUAGE OF THE MISSOURI CONSTITUTION

Two sets of Amici, Associated Industries, et al., and City of Springfield, et al., have filed amicus briefs in support of Respondent's position. Neither brief seriously addresses the Constitutional issue before the Court.[4] To the contrary, the Amici appear to be asking this Court to act as a super-legislature,

[4] The brief of Associated Industries, et al., devotes one paragraph to the Constitutional issue, relying entirely on the dicta from *Hammons* discussed at pp. 10-11, *supra*, and does not address either the arguments or the authorities cited by Relator. (Br. of Amicus Assoc. Ind. et al., p. 14). The

crafting the outcome on a *tabula rasa* based on who has the most clever "public policy" argument, rather than acting in its proper role as the faithful servant of Missouri's supreme law, its Constitution. The Court should reject this enigmatic entreaty.

The arguments of Amici are almost exclusively jeremiads, predicting dire outcomes if the Court enforces Missouri's Constitution as it is written. Amici Associated Industries, et al., predict "an almost inevitable tidal wave of new litigation in Missouri's courts, primarily targeted at the circuit courts of St. Louis City and Jackson County." (p. 22, n. 7). Amici City of Springfield, et al., claim to be "concerned with the potential financial impact [of] run away jury verdicts." (p. 14). This Court has wisely seen through similar arguments before:

> In answer to the argument that permitting such claims would release the floodgates of litigation, experience in jurisdictions which abrogated the impact rule proved to the contrary. [citations omitted] Furthermore, numerous courts announced the proposition that any increase in litigation should not be determinative, but rather that it was the duty of the courts to afford a forum for the remedy of wrongs. Pennsylvania Railroad Company,

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brief of City of Springfield, et al., spends three pages on the issue, relying on the dicta from *Hammons* and simply repeating the *Sweeney* line of cases, while failing to address the arguments and authorities raised by Relator.

58 Del. 454, 210 A.2d 709, 714 (1965), says typically, 'if there be increased litigation, the courts must willingly cope with the task.'

Bass v. Nooney, 646 S.W.2d 765, 770 (Mo. 1983). Significantly, *Bass v. Nooney*, involved a decision to update a common law rule based upon sound public policy considerations, something within the Court's inherent discretionary authority. Here, the Court is duty bound to apply the Constitution as it was written, something it cannot shy away from based upon real or imagined policy considerations. *State ex rel. Riverside Joint Venture v. Missouri Gaming Com'n* 969 S.W.2d 218, 221 (Mo. 1998)(the constitution is the "supreme law of Missouri").

Just as the court did in *Bass*, the Court here should take note of the experience of the several other states, including Rhode Island, West Virginia, New Jersey, Ohio, Vermont and Massachusetts, that have allowed juries to decide discrimination cases and award uncapped damages. *See* R.I. Gen. Laws §§28-5-6(7)(i) and 28-5-24.1; *Fud's Inc. v. State*, 727 A.2d 692, 696-697 (R.I. 1999); W. Va. Code §§5-11-3(d) and 5-11-13(c); *Perilli v. Bd. of Educ.*, 387 S.E.2d 315, 317 (W. Va. 1989); *Haynes v. Rhone-Poulenc*, 521 S.E.2d 331, 348 (W. Va. 1999); N.J.S.A. §10:5-5(e) and 10:5-13; *Cavuoti v. N.J. Transit Corp.*, 735 A.2d 548, 553, 562-563 (N.J. 1999); Ohio Rev. Code §4112.01(2); *Taylor v. Nat'l Group of Cos.*, 605 N.E.2d 45, 46 (Ohio 1992); *Rice v. Certainteed Corp.*, 704 N.E.2d 1217, 1219 (Ohio 1999); 21 V.S.A. §495d(1); *Hodgdon v. Mt. Mansfield Co.*, 624 A.2d 1122, 1125-1126 (Vt. 1992); Mass. G. L. Chap. 151B §§1(5) and 9; *Dalis v. Buyer Advertising*, 636 N.E.2d 212, 215 (Mass. 1994); *Bain v. City of Springfield*, 678 N.E.2d 155, 159-160 (Mass. 1997).

Neither set of Amici present any evidence that jury trials of discrimination cases in these states have imposed undue hardships on small employers or municipalities. There is no reason to think it will be any different in Missouri. Indeed, it *hasn't* been any different in Missouri in the last 16 years.

Amici Associated Industries, et al., predict that "MHRA claims would be filed in those jurisdictions perceived to be advantageous to plaintiffs." (p. 21). Apparently, these Amici have never bothered to closely read § 213.111 which requires that an action be brought in the "county in which the unlawful discriminatory practice is alleged to have occurred." Thus, unlike in other types cases where a number of circumstances can support venue in the City of St. Louis as Amici claim to fear, the only way to be sued in the City of St. Louis under the Missouri Human Rights Act is to discriminate against someone in the City of St. Louis. Thus, employers, not plaintiffs or their lawyers, are in complete control over where state court claims under the Missouri Human Rights Act will be filed.

Based on the absence of any evidence that such has occurred in the other states identified above, the assertion of Amici Associated Industries, et al., that "an almost inevitable tidal wave of new litigation" would result from the properly interpreting and enforcing the Missouri Constitution, is unsupported. Amici Associated Industries, et al. point out that 934 civil rights cases were filed in federal court in Missouri in 2001. What Amici fail to point out is that according to 2001 Annual Report posted on the website of the Office of State Courts Administrator, (A. 1-2), a total of 31,792 civil cases were filed in Missouri state court in 2001. Thus, even assuming Amici's dubious proposition that every single case would be filed in and remain in state court, the increase in the annual caseload filing would be less than three percent. Of course, not every case will be filed in state court and many of those that are will be removed to federal

court based on diversity of citizenship. Simply put, Amici's dire predictions of calamity, in addition to being wholly irrelevant to the what the Constitution requires, do not even withstand critical scrutiny.

CONCLUSION

In this case, Relator has asserted a claim "in which an issue of fact, in an action for the recovery of money only, is involved," such that the Constitution guarantees the right to trial by jury. *Briggs*, 20 S.W. at 33. Because "the issues joined entitle the parties to an ordinary judgment at law, then, under the Constitution and the laws of the state, the parties are entitled to a trial by a jury." *Lee*, 111 S.W. at 1153. Finally, because the claim asserted by Relator "is analogous to an action at common law" as opposed to a claim "in the nature of a suit in equity," the Constitution guarantees the right to trial by jury. *Bates*, 267 S.W. at 644. Only by ignoring the clear language of the Constitution and the Court's own consistent Constitutional jurisprudence dating back more than one hundred years, can the Court conclude that Relator has no Constitutional right to trial by jury in this case. The Court must make absolute its Preliminary Writ in Prohibition.

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I certify that:

1. The brief includes the information required by Supreme Court Rule 55.03;

2. The brief complies with the limitations contained in Supreme Court Rule 84.06(b);

3. A copy of the foregoing Brief has been filed with the Court on diskette, and a copy of that diskette has been served on each adverse party. The diskettes have been scanned for virus, and are virus-free; and

4. According to the Word Count Function of counsel's word processing software, the brief contains 6,045 words.

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CERTIFICATE OF SERVICE

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Appendix